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NEW JERSEY AND THE GREAT CORPORATIONS.[1]

II.

I HAVE given some of the reasons why the corporations choose New Jersey as their domicile; but this does not answer the question which seems to be more urgent at the present time, why New Jersey permits her laws to be made use of for the purpose of giving legal form to those great aggregations of rival enterprises which have been condemned in other States as combinations in restraint of trade and against public policy. How can she justify the fact that she permits and even encourages the formation of corporations which apparently accomplish the same result as the forbidden trusts?

The question is a broad one, and New Jersey has not attempted to give an answer to it. She has simply acted under the well-established policy of encouraging the aggregation of capital for business purposes, and has found herself suddenly confronted with a new condition arising out of an unexpected development in the world of trade and industry.

The difficulty is that there is nothing really new in the situation, except the extraordinary size of the corporations, the large amount of property controlled, and the vast extent of their enterprises. Their appearance is alarming; but after all, the size is only the result of unduly rapid growth, and it is not easy at once to devise means to check over-growth without risk of destroying the life. Combination of capital has become a necessary part of the social organization, and it is hard to stop it at any particular point in its development. The corporation has become the established means of uniting the money and energies of individuals to accomplish large undertakings, and there is no ready rule of law or of political economy to be applied to determine to what extent they shall grow, or how much property they shall acquire.

Look, for example, at the corporations by which the most extensive combinations of rival industries have been accomplished, and

[1] An address delivered before the American Bar Association at Buffalo, August 28, 1899. Continued from page 212.

it will be seen that they are exercising only the ordinary powers which have always been conferred upon ordinary business companies. The owners of mills in various parts of the country, tired of the struggle of ceaseless competition among themselves, are convinced that the cost of production can be diminished and the profits of the business increased by combining all under one ownership and control. They form a corporation under the laws of any State where corporations with ordinary powers are permitted to be formed. The value of the property and business of each is estimated as nearly as may be, and then they are sold to the new corporation for the prices agreed upon, and paid for in money or stock, as the parties may choose. The proceeds of the sale are divided among the stockholders, and the new corporation becomes the owner of the property and business of all the old ones, and proceeds to manage the business in such manner as may seem best to its stockholders and directors. It exercises the rights of ownership, and there is nothing in the ordinary rules of law that limits the amount of the property to be held, or the extent of the business to be controlled.

It is true that every State may limit the sphere of the action of its corporations. It may decline to give them power to hold property or carry on business outside of its own borders. It may confine the privileges of incorporation to its own citizens. It may compel their directors to hold their meetings and transact their business within the State; it may even limit the amount of property which they shall acquire; but unless it is willing to adopt this policy of close restriction, it cannot control the extent of the business that they shall carry on, or the number of rival manufactories that they shall absorb.

It is true that there are provisions in the statutes of New Jersey which make it easy for combinations of rival enterprises to form corporations under her laws. There is the provision that corporations may hold property and transact business in other States; but she is certainly not prepared to say that her business corporations shall not have the privilege possessed by every citizen of engaging in interstate commerce and holding property beyond the narrow limits of the State. There is the permission to directors to have an office and hold their meetings outside of the State; but this has been given for the last twenty-four years, and so long as careful provision is made for actually and constantly maintaining the principal office at a definite place within the State,

and so long as men of other States have their money invested in her corporations, she will not, without urgent reason, change her law so as to put them to the inconvenience of holding every meeting of the directors within her own borders.

She might insist on the close supervision of corporate business, require the filing of detailed reports of debts, assets, and earnings. She might levy taxes in such a way as to expose the company to the extortion of officials, or to make its business uncertain and the burdens oppressive; but these are questions of local policy which concern her dealings with all her corporations, and they are not to be settled with a view only to the effect of her policy upon the acquisition of property and the control of business in other States. With respect to reports of debts and earnings, she may well take the ground that the requirements of the stock exchange are more efficient than statutes in securing to the public a proper acquaintance with the condition of such corporations as are of public concern.

The most important provision with respect to the formation of large combinations is that which permits the purchase of stock of other corporations. It was under this that the Standard Oil Trust and other trusts were reorganized as corporations in New Jersey; but the same provision was adopted in New York as early as 1892, and has since been adopted in many other States, and, as I have already pointed out, this privilege is not necessary to the combination of several companies into one. It is quite possible, and it is now the common practice, for the new corporation to purchase the property itself and not the stock of the old companies. It is only a matter of convenience in some cases to purchase the stock and keep the old companies alive; but if it be forbidden to purchase the stock, there is nothing to prevent any one from buying the property, nor can the stockholders of the companies that sell their property be prevented from accepting stock in the new company in payment for their shares in the proceeds.

One of the inducements to the promotion of large corporations and the combination of industrial properties is the inflation of stock, and the creation of fictitious stock is one of the most serious evils of the whole movement.[1] This can be discouraged, though not wholly prevented, by the requirement that nothing but money

[1] Wetherbee *v.* Baker, 35 N. J. Eq. 501–512; Edison *v.* Electric Imp. Co., 50 N. J. Eq. 354 (1892).

shall be taken in payment of capital stock. The laws of New Jersey provide that stock may be issued for property purchased, and the property must be put in at a fair and *bona fide* valuation; yet under the decisions of the courts, and now under the statute, in the absence of fraud in the actual transaction the judgment of the directors as to the value of the property purchased is conclusive.[1] In this condition of the law it is impossible wholly to prevent undue inflation of the stock; but the true remedy is not in forbidding the issue of stock for property furnished, nor even in limiting it strictly to the value of the property. Some allowance must be made for the earning power of the property and business under the control of the new corporation, and some inducement of a speculative nature must be given to tempt capital into new and doubtful enterprises. It is stockholders and creditors that are chiefly interested in knowing what the property for which the stock is given is really worth, and they have full protection if they can ascertain what that property really was. The English plan is to punish promoters severely for issuing a false prospectus, and to require the contract for the purchase of the property to be written in detail, and give to anybody the right to obtain a printed copy of it for sixpence. New Jersey would do well to adopt both of these precautions against undue inflation, and she ought also to do away with that provision of a statute of 1893 by which, on the consolidation of two or more corporations, the amount of the capital stock may be fixed by agreement of the directors without any reference whatever to the amount of stock or property of the companies so combined.[2]

I cannot go in detail into the question of remedies. I have only referred to some of the chief characteristics of the law under which the great corporations are organized in New Jersey, so as to show that after all they are the provisions that are common to all companies, and are for the most part provisions that have been in force for many years, and that changes sufficient to effect a serious restraint upon the great industrial combinations would involve changes in the established policy of encouraging and protecting the aggregation of capital for the ordinary and necessary promotion of manufactures and industries of every kind. The fact is, as I have said before, that it is the great size of the new corporations

[1] Bickley *v.* Schlag, 46 N. J. Eq. 533; Vail *v.* Phillips, 14 N. J. Law Journ. 45.

[2] Laws 1893, p. 121. See also 1883, p. 242; 1888, p. 441.

and the extent of their property and business that makes the difference between them and those we have been accustomed to, and we have not yet found rules of policy by which to foster the one and discourage the other.

There are other States in which the great combinations of capital have agitated the public more strongly than in New Jersey, but in looking over the recent legislation of these States I find it strangely ill-adapted to the latest forms which these combinations have assumed. The legislation is called "Anti-Trust" legislation, and the laws, even the latest of them, are directed against "trusts" or combinations and agreements in restraint of trade. These are treated as in the nature of a conspiracy, and agreements of that character are made invalid and the acts described are indictable as misdemeanors. These statutes were directed against those combinations which consisted in agreements among rival corporations and took the form of "trusts," the stock of each company being assigned to trustees, who directed the policy of all the companies, regulating production, avoiding competition, and fixing the prices of the products. There were undoubtedly combinations and agreements, and they were declared to be illegal as in restraint of trade and creating monopolies; and this form of combination was therefore abandoned, and the simple one adopted by which the property of all was transferred out and out to a new corporation.

The name of "trust" is still applied in popular parlance to the large corporations, but in the application of a criminal statute it is hard to distinguish between two corporations formed under the same laws so as to denounce upon one the punishment prepared for the "trust" and to leave the other free to carry on its affairs. Proof of this is found in the difficulty the courts have had in enforcing these statutes, because the language used to define a trust or a contract in unlawful restraint of trade is broad enough to cover acts that are by common consent perfectly lawful, and such reasonable restraint of trade as has always been held to be legal.

In examining the decisions based upon the common law it will be found that in most of the cases it has been agreements that were declared to be illegal as in restraint of trade. It is the agreement that the courts refuse to enforce as being against public policy, and it is the agreement that is a conspiracy against the public welfare and indictable. But however reprehensible may be the means by which the organization of the corporation has been brought about, it is difficult to treat the existence of a corporation

lawfully formed as an agreement in restraint of trade, or to hold the ownership of all the flour mills that can be purchased to be an indictable conspiracy. There are cases in which it has been held that the objects of a corporation were illegal when it was formed in pursuance of an arrangement for purchasing all the available manufactories in the country, and the purpose of its existence was to control prices and create a monopoly in one of the necessary articles of commerce. Such were Richardson *v.* Buhl [1] in Michigan, Distillery and Cattle Feeding Co. *v.* People [2] in Illinois, and State *v.* Nebraska Distillery Co.[3] in Nebraska. In the first of these the decision of the court on this point was not within the issues argued by counsel, and the real point of the case was that the contract was void by which the plaintiffs had sold their property to the corporation. The other two cases were on proceedings in *quo warranto*, and the organization of the companies was annulled. In direct proceedings against the corporations it was held that they were formed for an illegal object and should be dissolved.

The fact remains that the legislation against trusts and combinations as conspiracies fails to reach the corporations already organized, however large they may be or however large a part of the trade they may control. It is just here that the policy of New Jersey is different from that which seems to prevail in the greater number of States. In New Jersey, it has been held that in a collateral proceeding the Court of Chancery has no power to restrain a corporation organized under the forms of law from performing acts within its corporate power merely because the purpose of its incorporation may have been to prevent competition and establish a monopoly; [4] and in a very recent case in the Court of Errors [5] it has been held that although contracts in restraint of competition in the production of some commodity in the production and sale of which the public have an interest are contrary to public policy, yet when such agreements result in the formation of a corporation with the powers conferred under the liberal statutes of New Jersey, it may lawfully buy the business of its competitors, and the courts cannot pronounce a contract for such permitted purchases invalid, although it may tend to produce, and may temporarily produce, a monopoly.

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[1] 77 Mich. 632 [2] 156 Ill. 448. [3] 29 Neb. 700.
[4] Attorney-General *v.* American Tobacco Co., 55 N. J. Eq. 352.
[5] Trenton Potteries Co. *v.* Oliphant, 43 Atl. Rep. 723.

I may quote the language of the Chief Justice as a clear statement of the opinion of the highest court of New Jersey on this subject. It was a case in which a corporation was formed for the purpose of buying the entire property of other corporations and carrying on their business, and the purpose was to control the business of that character throughout the greater part of the United States. The selling companies agreed not to engage in that business in any State in the United States, except in the State of Nebraska and the Territory of Arizona. A bill was filed to restrain the defendants from continuing to engage in that business. It was insisted that the contract could not be enforced because it was made in pursuance of an unlawful plant which was in restraint of trade and tended to create a monopoly.

After showing that an individual might lawfully purchase one rival business after another until he had, for the time at least, completely excluded competition, and that the courts in the absence of legislative restrictions, if such could be imposed, had no power to prevent it, and after referring to the liberal powers conferred on corporations for acquiring and holding property of every kind, including the stock of other corporations, the Chief Justice said: "Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The Legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the Legislature authorizing and permitting acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time at least destroy, competition. Contracts for such purchases cannot be refused enforcement."

A petition for a rehearing of this cause has been filed, and although the opinion of the court was unanimous, it is possible that after further argument a different conclusion may be reached.[1]

The court has declared in this opinion that "contracts by independent and unconnected manufacturers to control the prices of

[1] The court has since refused to grant a rehearing.

their commodities, either by limitation of their production or by restriction on distribution, or by express agreement to maintain prices, are without doubt opposed to public policy;" but it decides that a corporation having once been formed under statutes which authorize corporations to acquire and hold property of every kind in the same manner as individuals, the corporation must be regarded as possessing all the powers incident to the acquisition of property, and that contracts made for the protection of that property must be maintained.

If this conclusion is sound, then it will follow that the contrary conclusions in other States must ultimately be abandoned, and the "trusts" so widely condemned will be generally established under the form of great corporations which will accomplish substantially the same purpose as the combinations made between independent dealers and manufacturers.

However this may be, the practical question to be considered is, how we shall deal with the great combinations of capital in their new form as corporations. Shall we apply to them the rules of law and principles of public policy that are applied to corporations in general, making only such changes as new conditions and new dangers seem to suggest, or shall we regard them as something altogether new and monstrous, a class by themselves, enemies of society, and beyond the pale of the law?

It is insisted that because the objects they accomplish are the same as those of the trusts, and the trusts have been held to be illegal as monopolies and contracts in restraint of trade, the great corporations must, therefore, be treated as illegal, their corporate franchises revoked, and their property taken away from them. The difficulty is to distinguish between one corporation and another, and to make any uniform law that shall strike at the large corporations without affecting the ordinary rights of property and discouraging the combinations of capital that are now required for large undertakings. There is no doubt that limits may be put upon the amount of the capital stock of a corporation and the value of the property that it may hold. The purposes for which it may be organized may be restricted, and the business it is authorized to carry on may be strictly defined. All this is a matter of regulation, to be determined upon careful consideration of the best interests of the public; but the method that has been adopted by the legislatures and the courts of many States is to declare the corporation itself an unlawful thing, because the pur-

pose of its creation was to unite a number of rival enterprises into one and so avoid competition and create a monopoly. Agreements thus to unite have been held to be unlawful as in restraint of trade, and so the corporation itself is declared to be formed for an unlawful purpose and subject to be dissolved. The answer of the Court of Errors of New Jersey is that this consequence does not follow, and that even though such agreements be opposed to public policy, corporations duly organized under laws conferring general powers cannot be declared to be unlawful.

There is still another reason, and that is this: While it is well settled that certain kinds of contracts in general restraint of trade are void and not to be enforced, it is not true that such contracts are unlawful. There have been some expressions of opinion to that effect, but I think I may safely say that it was not until the doctrine came to be applied to the "trusts" that it was held in any well-considered opinion that contracts in general restraint of trade were criminal or even illegal.[1] If this be so, then even though the agreement to form a combination of capital may be against public policy and void, yet the corporation when formed is not the result of an agreement that was unlawful at common law.

It is open to serious question whether there is any foundation in the common law for the assertion so frequently made that these agreements for the combination of capital for the control of large fields of industry are illegal or even unenforceable.

There are two propositions assumed to be rules of law in condemning them. One is that monopolies are contrary to the common law, and the other that contracts in general restraint of trade are illegal. It has been held that the combinations are monopolies, and that in so far as they stifle competition on a large scale they are in restraint of trade, and the conclusion is that they are unlawful.

It may be that they are, under certain conditions, contrary to public policy; but the question ought to be dealt with as the question in issue, and not regarded as concluded by rules of law which were worked out under wholly different circumstances, and which the event may show are not applicable to the present conditions.

The first of these propositions is based on "The Case of Monopolies" in the reign of Queen Elizabeth,[2] and on the declaration of

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[1] See McGregor *v.* Mogul Steamship Co., 22 Q. B. Div. 598; App. Cas. [1892] 25.

[2] Darcy *v.* Allein, 11 Co. Rep. 84.

Lord Coke in the Third Institute,[1] that monopolies are against the ancient and fundamental laws of the realm; but the case related to the royal grant of an exclusive privilege of making playing-cards, and Lord Coke defined a monopoly as an institution or allowance by the King. He was commenting on the statute against monopolies, 21 Jac. I. c. 3, and declared that a patent for an invention was not good when it appeared that thereby bonnets and caps might be thickened by a fulling mill by which more might be thickened and fulled in one day than by the labors of fourscore men, who got their money by it. The resolution in Darcy *v.* Allein, and the declaration of Lord Coke, and all the statements in the early cases on monopoly, relate to the power of the King to grant special rights against the common right of the subject to labor and to trade.

It was not until a few years past that the doctrine of monopolies was applied, and then in this country, to what was called a practical monopoly, a condition arising, not out of any exclusive right, but merely out of the voluntary acts of individuals or corporations in obtaining control of the supply or manufacture of a commodity. The application of the rule to this condition may be a wise one, but it ought to be frankly acknowledged that the rule of law is a new one, and is not based on the opposition of the English people to royal grants of exclusive prvileges; and in making the application of the rule it should be carefully considered whether the combination can really obtain exclusive powers, or whether the fact that there is no legal prohibition against others does not in effect deter the combination from exacting undue tribute. This doctrine thus guarded and directed against monopolies of a dangerous character and large in extent, will enable the courts to protect the public against injurious acts on the part of combinations that are shown to be in fact against the interest of the community, but it does not justify them, in the absence of specific statutes, in declaring the existence of a very large corporation to be unlawful.

The other proposition is that combinations to reduce competition are in restraint of trade, and that contracts in general restraint are unlawful. The latter clause of this proposition was announced in early English cases which had no relation to combinations for the purpose of preventing competition. The leading case of Mitchel *v.* Reynolds, in which this rule was laid down in 1711, was a suit upon a bond given by a baker's apprentice not to exercise his trade

[1] 3 Inst. 184.

within the parish of St. Andrew's, Holborn, for the period of five years; and it was held that the restraint being reasonable, and the contract made upon good consideration, an action on the bond might be maintained. Chief Justice Parker referred to the "abuse that voluntary restraints are liable to, as, for instance, from corporations who are perpetually laboring for exclusive advantage in trade;" but the contract regarded as illegal was that of one man not to exercise his trade, and the reason of disapproving of it was that he would be deprived of the means of livelihood and the public to his services. There is a long succession of cases in England on contracts in restraint of trade, and nearly every one of them relates to contracts like that in Mitchel *v.* Reynolds, in which a man in leaving an employment or selling his business agreed not to carry on the same business within a certain area or for a given time, and the only question has been whether the restraint imposed upon this man with respect to the exercise of his own calling is greater than is reasonably necessary for the protection of the other party. The rule was laid down that contracts in general restraint of trade are illegal, but the reason given was that to restrain a man from carrying on his business in any part of England could not benefit the other party, and that it was injurious to the public, and in the latest cases where this reason has failed the rule itself has been regarded as inoperative.[1]

There are a few cases in England in which it has been held that manufacturers, for example, may not bind themselves to close their works at the dictation of the majority for the purpose of meeting a strike of the workmen;[2] but a similar combination on the part of the workmen, though formerly condemned as in restraint of trade, has long since been held to be legal both in this country and in England; and the House of Lords,[3] while admitting that a contract for such a purpose may not be enforceable, has decided that a combination of steamship companies to crush out competition by putting down prices and refusing to deal with their rivals was not an actionable wrong.

The doctrine of restraint of trade if applied to the combinations of capital must be taken with its limitation that the restraint to be illegal must be so general as to be unreasonable in view of the purposes for which it is imposed. It is applicable only to con-

[1] Nordenfelt *v.* Maxim Nordenfelt Guns, etc. Co., App. Cas. [1894] 538.
[2] Hilton *v.* Eckersley, 6 El. & Bl. 47.
[3] Mogul Steamship Co. *v.* McGregor, App. Cas. 1892, 35.

tracts and not to the ownership of property. While it makes such contracts void and unenforceable, it does not make them unlawful, and the formation of a corporation to carry out the void contract cannot therefore be treated as unlawful.

The mere fact that a contract is intended for the purpose of avoiding competition does not make it illegal. Every contract by which a man sells his business to another and agrees not to carry it on himself is intended for the very purpose of avoiding competition, and it is not because they stifle competition that contracts are considered us being in restraint of trade, but because they deprive the community of the benefit of the labor of one of the parties.

To prevent competition may incidentally work a restraint of trade, but it is of the essence of freedom of trade that men shall not be compelled to carry on business unless they wish to do so. They cannot be compelled to compete against their will. In a recent case in New Jersey brought to restrain a mining company from purchasing the mines of rival companies and consolidating their interests in settlement of a long litigation, Vice-Chancellor Pitney said: [1]—

"Now I am unable to find any foundation either in law or in morals, for the notion that the public have any right to have the private owners of this sort of property continue to do business in competition with each other. No doubt the public has a reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of free choice of the individual and not of any legal or moral obligation or duty." This decision was affirmed by the Court of Errors for the reasons given by the Vice-Chancellor.[2]

It is important for us in this country to observe that the English courts have not applied the doctrines of monopoly and

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[1] Meredith *v.* New Jersey Zinc & Iron Co., 55 N. J. Eq. 211.

[2] 57 N. J. Eq. 454.

restraint of trade to large industrial combinations, whether in the form of agreements or corporations. Vice-Chancellor Kindersley in 1867 denounced an agreement among railroad companies for the control of coal fields as a dangerous monopoly, but the decision was put on the ground that it was beyond the powers of the railway companies to lease and operate coal mines;[1] and this was followed by the Chancellor in New Jersey in a similar case relating to railways and coal mines.[2]

In the case of Mogul Steamship Company it was admitted that a combination among ship owners to crush out competition by lowering prices and discriminating against shippers who dealt with rival companies might be unenforceable if in general restraint of trade, but it was held that it was not illegal and was not a criminal offence, nor an actionable wrong, and the judges in the House of Lords maintained in the strongest language the right of combination for the purpose acquiring property and controlling business. As a matter of fact, the combination of business concerns in large corporations has been unchallenged in England and has reached enormous proportions.[3] The English opinion was expressed the other day by the London *Economist* when it said: "It is absurd to keep going a hundred inefficient competing agencies to do badly what one efficient consolidated agency can do well."

It is certain that the tendency in the United States toward combination and consolidation has not been seriously checked either by public opinion or by adverse legislation and judicial decision. The repeated assertion that such tendency is contrary to public policy has had scarcely any effect upon the actual results, although it may have changed the means by which they have been reached. If the result is really bad, some way will be found to prevent it, no matter what devices may be chosen to accomplish it; but the fact that the tendency has gone on so many years, and that the results are attained under the ordinary power of corporations to purchase and hold property, may well cause us to ask whether, after all, this movement in the direction of combination of interests and the prevention of undue competition is in fact wholly evil and in every aspect against the best interest of society,

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[1] Attorney-General *v.* Great Northern Ry. Co., Drew. & Sim. 184; 6 Jur. N. S. 1096.

[2] Stockton *v.* Central R. R. Co., 50 N. J. Eq. 52.

[3] McGregor *v.* Mogul Steamship Co., 23 Q. B. Div. 598; App. Cas. [1892] 25.

and whether the danger may best be met by trying to stop the movement, or by putting it under reasonable control.

The question is too large a one for discussion at this time. A great deal has been said and much remains to be said, on both sides, but I may at least suggest that the question is not concluded by the authority of the judicial decisions that have declared that these combinations are against public policy. "Judges," said Mr. Justice Cave,[1] "are more to be trusted as interpreters of the law than as expounders of what is called public policy;" and, as Lord Bramwell declared in a case which he said was an illustration of the wisdom of this remark, "No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?" The concurrence of judicial opinion is, of course, a strong indication of the public opinion, which, in a sense, is the policy of the people; but the question whether a contract or a great social movement is really against public interest is a question of fact, and a true conclusion depends, not so much upon the study of judicial precedents, or the application of oft-repeated maxims, such as "competition is the life of trade," or "contracts in general restraint of trade are illegal," as upon a close examination of social conditions and the study of the actual economic results. The judge must take a long view, both backward and forward, and he must watch the progress of economic science and be careful not to mistake for maxims of law the current phrases of a past age, and not to lay down as rules of law of the present day the declarations of economists whose theories have long since been abandoned.

The conditions of trade and manufacture are very different from what they have been. The extent of the territory that can be profitably occupied has become much greater, and larger undertakings can now be more easily controlled under a single management.

The great combinations of capital are new, and there has not yet been time to ascertain by experience what is the actual effect of uniting many enterprises for the purposes of reducing the cost of production and regulating the prices of commodities.

The obvious effect is to reduce competition, and it is competi-

[1] *In re* Mirams, 1 Q. B. [1891] 595.

tion that has been the ruling force in the struggle for existence in the commercial and industrial world. It was supposed to be competition alone that prevented men from asking more for their products than they were worth, and this being removed, there seems to be nothing to restrain the rapacity of those that control any industry; but the natural progress of production is from competition to combination, and from combination to co-operation. We have reached the second stage, but have not yet had experience of the effects of combination on a large scale. Nor do we know whether with the removal of competition there may not come the saving of ill-directed energy, the regulation of supply in accordance with the demand both in place and in time, a saving in the cost of production and a steadiness and a certainty of industrial effort and result and the command of all the capital needed for any useful enterprise, and that out of all these there will not come an increase of actual wealth, a wider distribution of it among the people as stockholders in the great corporations, and a decrease of the cost of commodities to the individual man.

There are grave dangers in the new conditions, and it is well that the courts are alert to guard against them, and are zealous to defend the people against the rapacity of the rich and powerful; but in most matters of business it is safer to let the people take care of themselves than for the courts to interfere with liberty of contract and the natural course of trade. If combinations of capital become too large to be managed with safety and profit they will fail. If they serve a useful purpose and are in accordance with the laws of social development they will go on, and the courts will be powerless to stop them. It is the right and duty of the courts to refuse to sanction contracts that are plainly opposed to public policy, but is a power not to be exercised without strong reason and only after the most careful consideration of the facts which go to prove what the best public policy really is. It is not enough to follow the public opinion of the day, nor even to accept judicial opinion of a former time. The question must be examined anew from time to time as conditions change, and in view of latest experience and the best opinion of experts in social science and of practical men of affairs.

Edward Q. Keasbey.

NEWARK, N. J.